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No. 08-984

IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERSTEIN, DENNIS VACCO, and PAUL DEBARY,

Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC. and PARK PLACE ENTERTAINMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where an Indian tribe is induced to enter into contracts relating to the management of a proposed casino that will operate on trust land, are those contracts valid and enforceable, even if not approved by the NIGC, simply because the land on which the casinos are intended to operate is not yet "Indian land"?

2. Are so-called "precursory obligations" contained in casino management contracts with Indian tribes enforceable if the NIGC has not approved the contracts?

3. Is the Land Purchase Agreement at issue in this case a collateral agreement relating to the management of an Indian casino?

PARTIES TO THE PROCEEDINGS

Respondents agree with the statement contained in the Petition for a Writ of Certiorari that the real parties in interest are Petitioner Catskill Litigation Trust and Respondent Harrah's Operating Company, Inc. Respondents also agree that the Trust is currently represented by trustee Dennis C. Vacco and Joseph E. Bernstein.

The Respondents do not agree that the Trust represents either the interests of 13,000 members of the St. Regis Mohawk Tribe or the Tribe as a juridical entity. The purported assignment of any claims held by any members of the Tribe or the St. Regis Tribe itself is currently the subject of separate litigation pending in the Northern District of New York, *Dennis C. Vacco and Joseph E. Bernstein, et al. v. Harrah's Operating Company, Inc. and Clive Cummis*, Case No. 07-CV-0663 (TSM/DEP).

CORPORATE DISCLOSURE STATEMENT

Respondent Park Place Entertainment Corporation ("Park Place"), changed its name to Caesers Entertainment Inc. and, on or about June 28, 2005, Caesars Entertainment, Inc. was merged into Harrah's Operating Company, Inc. Harrah's Entertainment, Inc. is the parent company of Respondent Harrah's Operating Company, Inc. There are no other parent and no publicly held company owning 10% or more of the stock of the Respondents.

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STATEMENT OF THE CASE

The Mohawk Tribe entered into a series of contracts with the Catskill Group[1] for (1) the sale of certain land in Monticello, New York for use by the Tribe as an Indian gaming facility, (2) the construction of the facility and (3) the management of the facility by the Catskill Group. Because an Indian gaming facility could only legally operate in New York on "Indian land", the parties asked the Bureau of Indian Affairs ("BIA") to take the proposed site (the "Monticello Site") into trust for the benefit of the Tribe.

In April 2000, after years of frustration with the Catskill Group, the Mohawk Tribe agreed to enter into an agreement with Park Place giving Park Place the exclusive right to develop casinos in the State of New York with certain exceptions not applicable here. Park Place proposed an alternative site for a Mohawk gaming facility also in the Catskill region (the "Kutsher's Site"). The Catskill Group claimed that Park Place had tortiously interfered with its agreement with the Mohawk Tribe. Park Place argued that there could be no tortious interference because the contracts were void because they had not yet been approved by the National Indian Gaming Commission ("NIGC") under the Indian Gaming Regulatory Act, 25 U.S.C. §2710(d)(7) ("IGRA").

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1. All the terms and abbreviations used herein are the same as those used by the Second Circuit Court of Appeals in its decision in *Catskill Development L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Circuit 2008) which appears at pages 1a-40a of the Appendix to the Petition for Certiorari herein ("Petitioner's App.").

The intent of IGRA and the accompanying regulations is clear: No management contract and no collateral agreement that relates to the management of the gaming operation is valid unless it is approved by the NIGC. The legislative history of IGRA confirms that the purpose of this statutory scheme is to shield tribes from organized crime and other corrupting influences and to insure that Indian tribes are the primary beneficiaries of gaming operations. 25 U.S.C. § 2702 quoted in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 547 F.3d 115, 119 (2008) (hereinafter "Catskill") (Petitioner's App. at 3a). That legislative purpose would be defeated if casino management companies could impose binding contractual commitments on tribes merely by signing the management contract before the land on which the casino would sit was taken into trust.

The Petitioners ask this Court to accept certiorari in this case because of the filing of a petition by Respondent in case No. 08-665 seeking review of *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.* 531 F.3d 767 (9th Cir. 2008) ("Guidiville")(Petitioners' App. at 197a). In *Guidiville*, the Ninth Circuit held that the subject contracts (which were not casino management contracts) did not require approval by the Secretary of Interior pursuant to 25 U.S.C. § 81 because the contracts related to land that was not yet "Indian land." It was not Indian land because it had not yet been taken into trust by the United States on behalf of the Indian tribe. The petition in *Guidiville* was based on the disagreement between the Second and Ninth Circuits with regard to the application of the Dictionary Act, 1 U.S.C. §§ 1-8 as it applied to the definition of "Indian land" and the relevant statutes in those two

cases. However, this Court denied certiorari in *Guidiville* on January 26, 2009, evidencing this Court's lack of interest in addressing that issue at this time.

The Dictionary Act issue is even less relevant to this petition since, as is more fully set forth below, the Second Circuit found that it did not have to address the question of whether the land at issue here was Indian land, because there is no requirement in IGRA, as opposed to § 81, that contracts subject to NIGC review must relate to "Indian land." *Catskill*, 547 F.3d at125-26 (Petitioners' App. at 15a-19a).

Moreover, the *Guidiville* decision does not support Petitioner's position. In *Guidiville*, the Ninth Circuit specifically noted that the casino management contracts at issue in that case were *not* valid because they had not yet been approved by the NIGC, even though the casino was to be placed on land that was not yet "Indian land." *Guidiville*, 531 F.3d at 126 (Petitioners' App. at 206a and n. 6).[2]

Finally, this is not an appropriate case to decide the "Indian land" issue because there are separate and

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2. Specifically, the *Guidiville* court stated that "the Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under § 2705(a)(4) due to the Tribe's failure to have obtained approval of that contract by the chairman of the Gaming Commission." Section 2705(a)(4) is the provision in IGRA that specifically gives the NIGC authority to approve management contracts for Indian gaming casinos. *See* Petitioners' App. at 432a.

independent grounds for the granting of summary judgment in favor of Respondents. The District Court found that, even if Petitioners could establish that they had a valid contract or that Respondents had engaged in wrongful conduct sufficient to state a claim for tortious interference with prospective business relations, Respondents would still be entitled to summary judgment because Petitioners could not establish, under New York law, that "but for" Respondents' actions, Petitioners would have consummated their contractual arrangement and built a casino at the Monticello site. The District Court found that there were numerous economic and regulatory hurdles that Petitioners still faced in bringing the casino to fruition and therefore they could not establish causation. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423, 440 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App.79a, 114a-115a). Events have proven the District Court correct because, even to this day, there are no Indian gaming facilities in the Catskill region.

PROCEDURAL HISTORY

This action was commenced by the Catskill Group in the United States District Court for the Southern District of New York on November 13, 2000 alleging claims against Park Place for tortious interference with contract, tortious interference with business relations, unfair competition and violations of New York's Donnelly Act. In its first decision, the District Court dismissed the tortious interference with contract claim because the Court found that none of the contracts that Park Place had allegedly interfered with had been approved by the NIGC as required by IGRA. The Court also dismissed the unfair competition and Donnelly Act

claims; Petitioners did not appeal those dismissals. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) ("Catskill I")[3] (Petitioner's App. at 143a).

The Catskill Group moved for reconsideration of *Catskill I* with regard to one of the contracts, the Land Purchase Agreement ("LPA"), arguing that that contract did not need NIGC approval. The Court granted reconsideration and reinstated the claim as to the LPA only. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 154 F. Supp. 2d 696 (S.D.N.Y. 2001)(Petitioner's App. at 125a). Park Place then moved the District Court to reconsider that decision and, while that motion was pending, moved for summary judgment on all the remaining claims. The District Court granted summary judgment dismissing the entire case, finding, after approximately forty (40) depositions, and thousands of pages of discovery, that the Catskill Group had failed to show that Park Place had engaged in any wrongful conduct. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App. at 79a). The Court also reinstated its decision in *Catskill I* holding that the LPA, like the other contracts entered into between the Catskill Group and the Mohawk Tribe, required NIGC approval.

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3. Respondents adopt the abbreviations used by the Second Circuit to identify the District Court's opinions. Petitioners have used abbreviations different from those used by the Second Circuit, causing unnecessary confusion.

While the appeal was pending from *Catskill II*, the Catskill Group moved pursuant to Federal Rule of Civil Procedure 60(b) to vacate the judgment based upon the discovery of six audio tapes which had not been produced to the Catskill Group in discovery. Finding that the failure to produce the tapes was a result of a mistake or misunderstanding, the District Court nonetheless held that the Catskill Group was entitled to further limited discovery based upon the evidence contained in the tapes. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 286 F. Supp. 2d 309 (S.D.N.Y. 2003) ("Catskill IV"). After granting such additional discovery, the District Court reaffirmed its grant of summary judgment in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 345 F. Supp. 2d 360 (S.D.N.Y. 2004) ("Catskill V") (omitted from Petitioners' papers and attached hereto as Respondent's App. at 1 A). Subsequently, while the second appeal was pending, the Catskill Group disclosed that complete diversity of jurisdiction was lacking because of the citizenship of one of its parties and, after remand and further proceedings below, that jurisdictional defect was cured. *See Debary v. Harrah's Operating Co. Inc.*, 465 F. Supp. 2d 250 (S.D.N.Y. 2006) ("Catskill VI")(Petitioners' App. at 41a). On October 21, 2008, the Second Circuit Court of Appeals affirmed the dismissal of the claim for tortious interference with contract and affirmed the grant of summary judgment on the claim for tortious interference with prospective business relations. *Catskill*, 547 F.3d at 136-37. (Petitioners' App. at 1a).

STATEMENT OF FACTS

In 1995, the Catskill Group acquired the 230-acre Monticello site for $10 million and, after unsuccessful negotiations with other tribes, eventually entered into agreements with the St. Regis Mohawk Tribe. The Catskill Group executed three (3) primary agreements with the Tribe: (1) a Management Agreement ("MA"), that would govern the actual management of the casino and provide the Catskill Group with a portion of the profits therefrom (R 508)[4]; (2) the Development and Construction Agreement ("DCA") that would govern the actual development and construction of the casino (R 596); and (3) the LPA by which the Tribe would acquire a 29-acre parcel out of the 230-acre site. All three agreements, by their very terms, were subject to federal approval (R 436).

In order to bring the project to fruition, the Catskill Group needed to overcome a number of regulatory hurdles. First, in order to operate a Native American casino that was not on an Indian reservation (which the Monticello site was not), the Catskill Group needed to convince the Bureau of Indian Affairs ("BIA") to take the land into trust on behalf of the Mohawk Tribe. *See* 25 U.S.C. § 2719(b)(1)(a). Once the BIA approved taking the land into trust, it was then necessary for the Governor to approve that transfer. On April 6, 2000, the BIA agreed to take the land in trust (R 921-38), but final approval was never given because the Governor had not yet consented to such transfer ((R 1567 at ¶ 8);

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4. Record citations appearing at "R ___" are references to the Record before the Court of Appeals.

217 F. Supp. 2d at 443-44), and the BIA had not made a final determination that the price to be paid by the Tribe did not exceed fair market value. *See* 25 C.F.R. Part 151; 217 F. Supp. 2d at 444 (R 874).

Moreover, no Class III casino can operate without a compact between the Tribe and the State of New York. 217 F. Supp. 2d at 444-45. Then-Governor Pataki had made it clear in numerous public announcements that no compact would be entered into with the Mohawks unless the Mohawks had settled their longstanding land claims dispute with the State. (R 1567 at ¶ 8).

In addition, any management contract and any related agreements that affected the management of the casino would have to be approved by the NIGC. Although the Catskill Group submitted their application to the NIGC in August 1996 (Appellants' Br. in the Court of Appeals at 16), it never received approval, and was formally rejected five (5) times. (*See* R 715-22; 865-66; 870-72; 873-74; 875-76). The NIGC questioned the suitability of the Catskill Group as manager of a casino in light of numerous regulatory problems encountered by one of the Group's principal investors with regard to its operation of casinos in the State of Mississippi. (*See* R 1225-95; 45-53). In addition, three principals of the Catskill Group were under criminal investigation, two have since been convicted, and one is a fugitive from justice. (R 1356-1432; 1631-36; 1433-36). Moreover, the Catskill Group demanded from the Mohawks a compensation scheme which was in excess of the established NIGC Guidelines (*See* R 717 at ¶ 1; 1653-66; 299-300; 301; 385) and had induced the Mohawks to pay $10 million for only 29 acres of land that the Catskill

Group has since admitted is worth only $150,000. (R 230; 248-49; 343; 356-57; 874 at ¶ 7).

The Catskill Group's problems before the NIGC were so numerous that, at a meeting held in February, 2000, NIGC staff advised the Mohawk Chiefs that their application for the Monticello casino was in serious trouble and that, in the NIGC's view, the Tribe was likely to encounter the same problems with the Catskill Group that it had encountered with the operation of the Mohawk's then-existing casino at the Akwesasne Reservation. (*See* R 740-51; 357; 359; 372; 243-44; 330; 363-65).

The Akwesasne Casino had opened in April 1999 under the management of President R.C. – The St. Regis Management Company ("President"), whose principal is Ivan Kaufman. The casino lost money from the day it opened, and the Mohawks were very concerned that the casino would fail, causing the loss of hundreds of jobs for tribal members. (*See* R 211-12; 262-64; 326). After an investigation was undertaken, the Tribe learned of numerous financial irregularities arising from President's management of the Casino and ultimately terminated President's management of the Casino in April, 2000. (*See* R 1670-75; 1676-77; 1678-90; 1691-92; 1693; 1713-18; 1720-21; 1722-23).

While the Catskill Group's application was bogged down with the NIGC (to the great displeasure and frustration of the Mohawks), the relationship between the Catskill Group and the Mohawks seriously deteriorated. The principals of the Catskill Group had cultivated a relationship with a faction of the Mohawk

Tribe, the so-called "Constitutionals" which was out of power, and the Three Chiefs' Government, which was then in power (R 67; 98-99), believed that they were being treated disrespectfully and dismissively by the Catskill Group's principals. (R 76; 258-60; 292; 224-25; 226-27; 288; 367; 752-53) (referring to Three Chiefs as the "three amigos.")). The relationship had gotten so bad that Robert Berman, one of the Catskill Group's principals, was ordered by the Chiefs to stay off the Reservation. (R 177; 132-33; 61; 95; 380).

Park Place had become interested in the possibility of developing a Catskill casino in the Fall of 1999 and approached Kaufman, whose firm was still operating at the Akwesasne Casino, to make an introduction to the Tribe.[5] Kaufman proposed, and Park Place agreed, that Park Place would consider some role in salvaging the Akwesasne Casino as a means of convincing the Mohawks to undertake a relationship with Park Place for the development of a casino in the Catskills. (R 1549-50). The principals of President and Park Place

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5. Petitioners' statements that Respondents "became prolific interlopers in Indian Country," that they had "developed a strategy to become involved in ventures that had already reached the regulatory approval stage" and that they developed a "legal defense strategy to insulate [themselves] from liability for breaking up contractual relationships with competitors of the tribes" (Petition at 7) are without any citation to the record and have no support in the record. There is also no evidence in the record and no citation to the record to support Petitioners' assertion (Petition at 8, 11-12) that either Park Place or its former executive, Arthur Goldberg, entered into the agreement with the Mohawk Tribe for the purpose of stopping the Monticello project, rather than for the purpose of developing Park Place's own project with the Tribe.

negotiated for several months over the terms of a possible takeover of the management of the Akwesasne Casino, but those negotiations were not successful and ultimately ended when the Tribe terminated its relationship with President. (R 1548; 1551; 1693; 1720-21; 1722-23).[6]

Soon after terminating its relationship with President, the Tribe offered Park Place a proposal whereby the Tribe would give Park Place an exclusive right (with certain exceptions) to develop casinos in the State of New York in return for a $3 million loan to be paid to the Tribe. The Tribe needed these funds to pay past due expenses to the New York State Police and the New York State Racing and Wagering Board for oversight of the Akwesasne Casino. An agreement was entered into on April 14, 2000 between the Mohawks and Park Place and, after this agreement was signed, the Catskill Group terminated all further discussions with the Mohawk Tribe. (R 725-26). Park Place offered terms to the Tribe for the operation of a casino at the Kutsher's site that was, in every respect, far superior to the offer the Catskill Group had made (R 350).[7]

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6. Petitioners' contentions that Park Place conspired with Kaufman or his company to "squeeze" the Tribe to Park Place's advantage was found to be without factual merit by the District Court. *Catskill V*, 345 F. Supp. at 365-68 (Respondent's App. at 11a-17a). That finding was affirmed by the Court of Appeals. *Catskill* at 547 F.3d at 136.

7. For example, the Three Chiefs concluded that there was "no comparison" between what Park Place offered the Tribe and what the Catskill Group was willing to give. (R 350, 357). Park Place offered what the Chiefs described as a "mega resort" (R 328, 342); the Catskill Group offered a land-locked island in the middle of the Catskill Group's racetrack property. (R 342, 349-50). The

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Within five (5) days of the April 14, 2000 agreement, the Catskill Group's NIGC application was rejected for a fifth time. (R 715-22).

ARGUMENT

I. Petitioners "Indian Lands" Argument was Properly Rejected by the Court of Appeals and is Inconsistent with Long Standing Case Law.

The District Court held, and the Court of Appeals agreed, that Park Place could not have tortiously interfered with any contract between the Mohawk Tribe and the Catskill Group because none of the contracts entered into were valid unless and until they had been approved by the NIGC. *Catskill*, at 547 F.3d at 124-25. That holding is consistent with longstanding case law.

(Cont'd)

Catskill Group proposed to sell the Tribe 29 acres for $10 million, despite the fact that it paid only $10 million for the *entire* 230-acre parcel. (R 230, 248-49); (343, 356-57). Park Place, in contrast, offered to *give* the Tribe 66 acres. (R 343). The Catskill Group also demanded 35% of the earnings of the casino, five percent greater than that allowed by NIGC guidelines. (R 521, 356). Further, the Catskill Group demanded a 5% "developer's fee." (R 612, 329-30, 246). In contrast, Park Place sought only 30% of the earnings of the casino and did not demand any developer's fee. (R 356). The Catskill Group also cut the Tribe out of all the ancillary developments that the Catskill Group planned to build on the land surrounding the casino, including retail amenities, entertainment facilities and a hotel. (R91-92, 292-93; 294-95, 343, 349-50, 357). Park Place's deal included a hotel and all retail, sports and entertainment amenities from which the Tribe would receive 70% of the profits. (R349-50, 357). Finally, the Catskill Group intended to charge the Tribe for 90% of the cost for all the access roads in the entire project. (R66).

A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 788-89 (9th Cir. 1986); *Scutti Enterprises, LLC v. Park Place Entertainment Corp.*, 322 F.3d 211, 215-16 (2d Cir. 2003); *Native American Servs., Inc. v. Givens*, 213 F.3d 642, 2000 WL 328137, at *1 (9th Cir. March 23, 2000) (gaming management contract not approved by NIGC is void); see also *The Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 889-90 (10th Cir. 1989) (bingo management contract not approved pursuant to 25 U.S.C. § 81 is void).

In an attempt to evade this longstanding case law, Petitioners argued, *for the first time on appeal*[8], that, even though casino management contracts must be ratified by the NIGC, the contracts with the Mohawk Tribe did not have to be ratified because the land on which the casino was to be built was *not yet* Indian land. The Second Circuit properly held that this argument carried no weight because, by the clear terms of IGRA, NIGC approval of Indian management contracts is not

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8. This argument was never made below to the District Court. Thus Petitioners' statement on page 19 of their Petition that this argument had been repeatedly ignored by the District Court, "*without explanation*" is wrong and disingenuous. Indeed, the only reference to this issue below was one sentence in the Catskill Group's Motion for Reconsideration of the initial order dismissing the tortious interference with contract claim, referencing that it was allegedly the Bureau of Indian Affairs's position that none of the agreements required approval because the land was owned by Catskill, and therefore the contracts did not involve "Indian lands." See May 30, 2001 Catskill Br. in Support of its Motion for Reconsideration, at 17. This argument was not made in the Catskill Group's opposition to the Park Place motion for summary judgment.

dependent upon whether the casino was on Indian land *Catskill* at 547 F.3d at 125-26. Moreover, the Second Circuit properly held that reading an Indian land requirement into the statute and requiring that the land be in Indian hands before NIGC review would apply, would eviscerate Congress's intent to promote and protect the best interest of Indian tribes. *Id.* The fact that the land on which the casino is intended to operate is not yet in trust does not eliminate the need for the NIGC oversight that Congress believed was necessary to protect Indian tribes from improvident gaming contracts. *Id.* at 126.

This case presents the perfect example of the Second Circuit's reasoning. Under Petitioners' argument, once the Mohawk Tribe had signed a contract with the Catskill Group, it would be forever wedded to the Catskill Group, even if other suitors presented more favorable proposals to the Indian tribe (which Park Place did) and even if the NIGC found the Catskill Group contracts not to be in the Tribe's best interest (which it did) and even if the NIGC refused to approve those contracts (which it did). In rejecting Petitioners' argument, the Second Circuit held that the Mohawk Tribe was free to solicit new offers and to enter into new agreements unless and until a contract with any particular management group was approved by the NIGC.[9]

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9. Ironically, the Catskill Group itself took advantage of this principle. Ultimately, the Mohawk Tribe became dissatisfied with its arrangement with Respondent Harrah's because the Tribe could not obtain BIA approval to take the Kutsher's site

(Cont'd)

Moreover, Petitioners' argument simply makes no sense. Under Petitioners' reading of IGRA, a management contract with an Indian tribe would be valid so long as the BIA did not approve the land into trust. Once the BIA approved the land transfer into trust, however, the contracts would then become *invalid* because the land would then be Indian land, and the contracts would require NIGC approval. The contracts would then remain invalid unless and until the NIGC subsequently approved the contracts.

The more logical and common sense approach is to simply hold that management contracts with Indian tribes must, at all times, be approved by the NIGC and that is exactly the way the NIGC interpreted its obligations in this case. As both the District Court and the Court of Appeals found, the NIGC rejected the Catskill Group's contracts five times, even though the land had not yet been (and never was) taken into trust. *Catskill* at 547 F.3d at 125-26 (Petitioners' App. 14a-18a), *Catskill II*, 217 F. Supp. 2d at 442 (Petitioners' App. 114a-115a).

(Cont'd)

into trust. The Mohawk Tribe, believing that the original Monticello site would be approved by the BIA, went back to the Catskill Group and entered into new contracts, walking away from its agreement with Harrah's. In the ultimate irony, the successor to the Catskill Group ultimately walked away from its agreement with the Mohawk Tribe when neither it nor the Mohawk Tribe could obtain BIA approval for the Monticello Site.

II. Petitioners' "Precursory Obligation" Theory Does Not Merit Review Because it is Flatly Inconsistent with Established Case Law and the Purpose of IGRA.

Petitioners also argue that, even if the "operative terms" of the management contracts needed to be approved by the NIGC before they became effective, certain provisions of those contracts, the "precursory obligations", should be held valid insofar as they require the tribe to act in good faith to seek agency approval. As the Second Circuit held, this argument was flatly rejected in *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788-89 (9th Cir. 1986). Further, the Second Circuit, in its extensive analysis, properly rejected Petitioners' reliance on other cases which clearly do not support Petitioners' precursory obligation theory.

Moreover, like their Indian lands argument, Petitioners' precursory obligation argument is flatly inconsistent with the purpose of IGRA. If the Tribe were required to honor its so-called precursory obligations without NIGC approval, then it would be prevented from soliciting or receiving offers from other management firms even if, as happened here, the NIGC advised the Tribe that the contracts were not in the Tribe's best interest. The clear intent of IGRA was to protect Indian tribes from undue influence and corruption by insuring that no management contract and no portion of any management contract would become effective unless or until it was approved by NIGC. Requiring the Mohawk Tribe to stick with the Catskill Group's contract and to take all steps necessary

to obtain approval of that contract, even if the Tribe changed its mind or concluded that the contract was not in its best interest, is clearly inconsistent with that Congressional purpose.

III. Petitioners' "Collateral Agreements" Argument is Without Merit and is Fact-Specific to this Case.

Petitioners argue that the LPA is merely a "collateral agreement," not a "management agreement," and therefore does not need to be approved by the NIGC. The law with regard to whether a collateral agreement is subject to NIGC review is not in dispute. As the Court of Appeals properly held and as Petitioners concede (Petition at 34), the NIGC's approval is required, not only for management contracts, but also for collateral agreements that provide "for the management of all or part of a gaming operation." *Catskill*, 547 F.3d at 130-31. (Petitioners' App. at 25a-26a) (quoting 25 C.F.R. § 502.15).

The issue here is a factual one which does not merit this Court's review: i.e., does the LPA relate to the management of the proposed Monticello casino? As the Court of Appeals found, the NIGC in this case specifically treated the LPA as a collateral agreement relating to management because the NIGC questioned whether the LPA contained a hidden management fee and was therefore related to the management of an Indian gaming operation. *Id.* at 131 (Petitioners' App. at 28a). In addition, the Court of Appeals noted that the parties contemplated that the NIGC would have to approve the LPA; they submitted the LPA to the NIGC for approval; and never argued to the NIGC that the LPA did not need NIGC approval. *Id.* Finally, the Court of Appeals

noted that the LPA, by its terms, was contingent upon BIA approval of the transfer of land into trust for the Tribe. *Id.* Thus, without NIGC or BIA approval, the LPA was not an enforceable contract and Petitioners' tortious interference with contract claim must fail as to the LPA, as it fails with respect to the MA and the DCA. *Id.* 131(Petitioners' App. at 28a-29a)[10].

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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10. Petitioners do not dispute that the MA, being a management agreement was subject to NIGC approval. Further, as the Second Circuit expressly noted, *Catskill*, 547 F.3d at 130(Petitioners' App. at 28a), the NIGC held that the MA and the DCA together were in fact management contracts subject to NIGC approval.

APPENDIX

APPENDIX — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 15, 2004

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 00 CIV.8660(DM).

CATSKILL DEVELOPMENT, L.L.C., Mohawk Management, L.L.C., and Monticello Raceway Development Company, L.L.C.,

Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORP.,

Defendant.

Nov. 15, 2004.

MEMORANDUM DECISION AND ORDER REVISITING THE COURT'S PREVIOUS FINDING CONCERNING EVIDENCE OF "WRONGFUL MEANS;" REINSTATING THE JUDGMENT AND DIRECTING THE CLERK OF THE COURT TO ENTER JUDGMENT FOR DEFENDANT

MCMAHON, District Judge.

On October 7, 2003, this Court issued a Memorandum Decision and Order granting plaintiffs' motion to vacate this Court's decision granting summary judgment to defendant on plaintiffs' claim of intentional interference with prospective business relations. This court had jurisdiction to enter the order because the United States Court of Appeals for the Second Circuit-where an appeal from this court's final judgment was pending-relinquished jurisdiction so that I could reopen the record and reconsider my previous finding that plaintiffs had failed to adduce evidence of "wrongful means," necessary predicate to establishing their claim of intentional interference. In the October 7 decision and order, I directed the parties to conduct limited discovery on a very tight time line and to present briefs limited to the subject of "wrongful means" so that I could decide the issue and get the case back to the Second Circuit.

An intervening event extended the schedule. On November 21, 2003, the Second Circuit certified to the New York Court of Appeals, in case entitled *Carvel Corporation v. Noonan*, 350 F.3d 6 (2d Cir.2003), the question of whether a franchisee had a valid claim for interference with prospective economic relations. The New York Court of Appeals accepted the certified question in order to clarify certain language in its controlling case, *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980) and *NBT Bancorp. Inc. v. Fleet/*

Norstar Financial Group, Inc., 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996), concerning what a plaintiff must show "where there has been no breach of an existing contract, but only interference with prospective contract rights. . ." *NBT, supra*, 87 N.Y.2d at 621, 641 N.Y.S.2d 581, 664 N.E.2d 492. Because the answer to that question could have proved dispositive of the question I had reclaimed this case to resolve-whether plaintiffs had raised a genuine issue of material fact concerning defendant's alleged use of "wrongful means" to induce the St. Regis Mohawk Tribe to enter into an exclusive casino development agreement with Park Place—I put everything on hold pending the outcome of *Carvel*.

On October 14, 2004, the New York Court of Appeals handed down its decision in *Carvel v. Noonan*, 3 N.Y.3d 182, 818 N.E.2d 1100 (2004). I have read that decision and the briefs of the parties commenting thereon. To my great dismay, I fear I agree with plaintiffs that Judge Robert S. Smith's opinion does not set forth the sort of "bright line" test for what constitutes "wrongful means" that I was hoping for. I must, therefore, wrestle with the issue I started out to address upon vacatur of the original judgment. Judge Smith's opinion does, however, offer me some guidance on the point, which I gratefully accept.[1]

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1. To avoid any confusion between the two appellate courts, all references to a "Court of Appeals" are to the New York Court of Appeals. The United States Court of Appeals for the Second Circuit is referred to as the "Second Circuit."

Appendix

I. Carvel and the Concept of "Wrongful Means" in Connection with the Tort of Interference with Prospective Economic Relations

The second cause of action in the complaint in this action (the only claim with which we are concerned) alleges that Park Place intentionally interfered with plaintiffs' non-contractual but prospective business advantage with the St. Regis Mohawk Tribe in connection with the casino it proposed to develop at the Monticello Raceway in Sullivan County, New York.[2]

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2. I decline to revisit my conclusion that the unapproved Land Purchase Agreement (LPA) and Development and Construction Agreement (DCA) between the Tribe and plaintiffs were not enforceable contracts. Plaintiffs invite me to alter this conclusion based on an opinion letter issued by the National Indian Gaming Commission on January 9, 2004, which held that not all "collateral agreements" between tribes and outsiders related to gaming on reservations had to be submitted for NIGC review and approval before they were valid. Plaintiffs' argument is not persuasive for three reasons. First, the NIGC opinion letter post-dates the events in issue by many years, was issued by an entirely different administration in Washington, and relates to an entirely different set of contracts between the St. Regis Mohawk and parties who are not involved in this lawsuit. Second, it is indisputably clear from the record in this case that back in the late 1990s-the relevant time period for our purposes—the NIGC *did* insist on approving collateral agreements. Plaintiffs' own behavior supports no other conclusion. Plaintiffs submitted the Land Purchase Agreement to the NIGC for its review and engaged in a lively debate with the NIGC over whether the LPA was part and parcel of the Management Agreement. The record shows that NIGC personnel

(Cont'd)

Appendix

Under New York law, a third party's interference with a prospective business relationship that has not

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(Cont'd)
viewed the LPA as an integral part of the Management Agreement because the proposed payment for the land was viewed by NIGC personnel as a disguised management fee. Plaintiffs disputed the NIGC staff interpretation. Third, the recent opinion letter changes nothing because, had the NIGC ultimately reached the conclusion that the vastly inflated land price was really a disguised management fee, then the LPA would have been subject to approval even under the terms of that opinion letter. ("If the. . . . agreement existed at the time of the approval of the management contract, and if it was reviewed, *it would have been subject to approval or disapproval as a management contract if it. . . . provided for management of the gaming operation in some manner.*") The issue of whether the LPA was part and parcel of the Management Agreement—hotly disputed between plaintiffs and the NIGC staff—had not yet been decided by the Agency when the Tribe abrogated its relationship with plaintiffs, *Catskill Development L.L.C. v. Park Place Entertainment Corp.*, 217 F.Supp.2d 423, 433 (S.D.N.Y.2002) (*Catskill III*), and there could be absolutely no guarantee that the NIGC would have come down in plaintiffs' favor on this point. In fact, the record reveals that plaintiffs had made little headway in convincing the staff that the land purchase price was not a disguised management fee. Plaintiffs' contention that the 2004 NIGC letter should alter my analysis of the need for approval of the LPA is, therefore, without merit.As for the DCA, as I noted in *Catskill III*, 217 F.Supp.2d at 429 n. 2, the NIGC actually made a determination that the DCA was part and parcel of the Management Agreement, resolving the issue that was left unresolved with respect to the LPA, and rejecting plaintiffs' position. This means that, even under the reasoning of the 2004 NIGC opinion, it was subject to NIGC approval. In fact, the NIGC opinion letter vindicates this Court's reasoning insofar as the DCA is concerned.

yet been reduced to contract is actionable only in limited circumstances. To prevail on such a claim, a plaintiff must show that the defendant's conduct was "culpable." That can mean one of two things:

> (1) The defendant acted for the *sole* purpose of inflicting intentional harm on the plaintiffs. Actions taken to promote the economic interest of the defendant are not taken for the sole purpose of harming the plaintiff; or
>
> (2) The defendant effected the interference by "wrongful means."

For many years, it appeared that "wrongful means" was limited to the commission of acts that were either criminal or independently tortious. However, in *Guard-Life*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445, the New York Court of Appeals referred approvingly to Section 768 of the Restatement [Second] of Torts, the comments to which described "wrongful means" to include not only criminal acts, but "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure, ... [but not] persuasion alone although it is knowingly directed at interference with the contract." Predictably, a question arose: since a party was privileged to attempt to procure business for itself as long as it did not interfere with a bona fide contract, what could possibly be meant by "some degrees of economic pressure?" Economic pressure was all but guaranteed in any situation where a competitor tried to step between his

competitor and a third party with whom both wished to deal. What would make such economic pressure wrongful?

My hope was that the New York Court of Appeals would answer this question definitively in *Carvel.* It did not.

Carvel was a suit brought by several Carvel franchisees against their franchisor, alleging that Carvel's distribution of its products through supermarkets that competed with the plaintiff-franchisees was both tortious and a violation of their franchise rights. Among the claims asserted was one for "interference with prospective economic relations" between the plaintiff franchisees and their customers. The gravamen of the claim was that Carvel induced persons who would otherwise have bought their ice cream from Carvel to purchase Carvel products in supermarkets. The New York Court of Appeals concluded that this claim was foreclosed by New York law.

The *Carvel* court did reject the plaintiff's assertion that the economic pressure exerted in that case—special offers to the supermarkets, including price concessions, that allowed them to undersell the independent franchisees and thus made the supermarkets a more attractive venue for customers—constituted "wrongful means." In so holding, the Court of Appeals did endorse the proposition that the economic pressure had to be "extreme and unfair," 3 N.Y.3d at 191, 785 N.Y.S.2d at

363, 818 N.E.2d at __, 2004 WL 2320368 at *4, or "egregious wrongdoing, 3 N.Y.3d at 188, 785 N.Y.S.2d at 361, 818 N.E.2d at __, 2004 WL 2320368 at *2." However, the Court of Appeals did not set limits on what kind of conduct might someday be deemed extreme and unfair or egregious. In particular, the Court refused to hold that the phrase "some degree of economic pressure," which appears in the Restatement [Second] of Torts, meant that conduct would not be deemed extreme and unfair or egregious unless it violates antitrust laws or other well-established principles of tort. It avoided those issues, stating, "[W]e do not decide today . . . whether there can ever be other instances of conduct which, though not a crime or tort in itself, . . . could be the basis for a claim of tortious interference with economic relations. That is a question we leave for another day, because no such egregious conduct was shown here." 3 N.Y.3d at 190, 785 N.Y.S.2d at 362, 818 N.E.2d at __, 2004 WL 2320368 at *3.

The Court of Appeals rejected the argument that Carvel's inducement to supermarkets constituted "wrongful economic pressure" for two reasons, but neither of them sheds any light on what might constitute "wrongful economic pressure" in the case before me, because they are based on facts not germane to our case.

First, in *Carvel*, the alleged economic pressure was directed at the competitor of the plaintiff, not at a third party with whom both the plaintiff and plaintiff's competitor were trying to do business. *Carvel*, 3 N.Y.3d

at 188, 785 N.Y.S.2d at 361, 818 N.E.2d at __, 2004 WL 2320368 at *2. The Court of Appeals ruled, "[T]he economic pressure that must be shown is not, as the franchisees assume, pressure on the franchisees, but on the franchisees' customers . . ." *Id.* 3 N.Y.3d at 191, 785 N.Y.S.2d at 363, 818 N.E.2d at __, 2004 WL 2320368 at *4. In this case, the alleged economic pressure *was* directed at the third party "customer"-the Tribe-which had been working on a casino project with plaintiffs but transferred its allegiance to defendant.

Second, in *Carvel* the plaintiff and defendant were franchisor and franchisee, and because of the special nature of that contractual relationship, the Court of Appeals concluded that it was neither wrongful nor unfair to relegate plaintiffs to the rights specified in their franchise agreement. Here, no analogous contractual relationship exists between the Tribe and anyone—that is precisely why plaintiffs are relegated to an interference with prospective commercial relations claim.

Thus, *Carvel*, while interesting and informative, does not definitively resolve the question before me.

II. "Wrongful Means" The $3 Million Payment

No evidence in the record suggests that Park Place committed any criminal act to induce the Tribe to break off its relationship with plaintiffs, and it cannot be disputed that Park Place did not act solely to harm plaintiffs, but was instead promoting its own economic

self-interest. But Park Place gave the Tribe a desperately-needed $3 million cash infusion to induce it to walk away from its unconsummated but long-in-the-making relationship with plaintiffs and enter into an exclusive Catskill casino development arrangement with defendant. In *Catskill III*, I concluded that plaintiffs had not raised any genuine issue of material fact concerning whether that payment constituted "wrongful means." I vacated the original judgment in favor of defendant so I could reconsider that question after plaintiffs took additional discovery.

Plaintiffs have, predictably, gone beyond that rather narrow issue and suggest that the newly-discovered evidence raises a genuine issue of fact concerning other possible "wrongful means." Before I turn to those contentions, let me revisit the issue of the $3 million payment.

The underlying facts concerning the $3 million payment have not changed since *Catskill III* was handed down. The Tribe was in financial difficulty in early 2000. It owed the State of New York $3 million arising out of the operation of its Akwesane casino on the Canadian border. Akwesane had been a poor performer for years, and there is no evidence in the record before me that Park Place was responsible for that fact. On April 7, 2000, the State explicitly demanded that the $3 million be paid. The Tribe had to come up with the money right away. The evidence shows that Tribal leaders did not view plaintiffs as a viable source of funds. Instead, they approached Park Place to ask

for a loan of $3 million. Park Place agreed to give the loan, but only on the condition that the Tribe abrogate it relationship with plaintiffs and grant it the exclusive right to partner the Tribe in developing a casino in the Sullivan County.

Well prior to *Carvel*, I concluded that this sequence of events did not constitute the sort of "wrongful economic pressure" that would satisfy plaintiff's burden of proving "wrongful means" in connection with the alleged tort of interference with prospective business relations. Nothing in *Carvel* causes me to conclude that Park Place's conditioning its payment on the exclusive constitutes conduct so "egregious" or "extreme and unfair" as to rise to the level of "wrongful economic pressure." It remains undisputed that the Tribe came to Park Place for the money, not vice versa. Park Place is not a bank that makes loans to applicants. It is a business enterprise, a publicly-held corporation; it cannot make payments willy-nilly to third parties without getting something in return.

Plaintiffs, however, have more or less abandoned this "wrongful means" argument. They now rely on their alternative argument that "wrongful means" analysis is not necessary, because when Park Place gave the loan in exchange for the exclusive it committed an independent tort—namely, knowing participation in a breach of fiduciary duty committed by Ivan Kaufman, the Chief Executive Officer of a third party corporation, President RC. President managed the Mohawk's Akwesane casino. In a February 16, 2000 conversation

that was tape recorded, Kaufman said he was "squeezing" the Tribe in Akwesane and slowing down payrolls. I ruled (and I adhere to my prior ruling) that the fact that Park Place's general counsel, Clyde Cummis, said, "Yeah," and "Yep," in response to (or during) Kaufman's statements did not, in and of itself, support any inference that Park Place had knowingly participated in any wrongful conduct on Kaufman's part. I allowed plaintiffs to take additional discovery to see if they could turn up any hard evidence of Park Place's complicity in Kaufman's "squeezing" of the Tribe's payroll from Akwesane. Absent evidence (not speculation) about Park Place's knowing participation with Kaufman in a plot to "squeeze" the Tribe's payroll and create some economic difficulty, I intended tc adhere to my original ruling.

No such evidence has been submitted to this Court.

First, I want to make it clear that I am not concerned with whether there was actually a payroll slowdown. The taped conversation at the very least creates a disputed issue of fact on that point. However, to go forward on the "knowing participation in a breach of fiduciary duty" theory, there has to be evidence of two things: (1) Park Place knew about the payroll squeeze (and the tape creates at least an issue of fact as to that, too), and (2) Park Place knowingly participated in bringing the payroll squeeze about. Otherwise, as far as this court is concerned, Park Place did not "knowingly *participate*" in Kaufman's alleged breach of fiduciary duty (and I will assume arguendo that slowing down the payroll, if that

in fact happened, was a breach of Kaufman's fiduciary duty to the Tribe). I decline to reverse myself on two points that plaintiffs keep rearguing—that Cummis's non-commital comments, without more, are evidence that Park Place *participated in* (as opposed to *knew about*) the payroll squeeze; and that a reasonable jury would interpret his words as "advice or encouragement to act" that can qualify as "knowing participation. On the latter point, I note something that is self-evident from the tape of the February 16 conversation-the payroll squeeze had already happened—so any statement by Cummis could not reasonably be interpreted as encouraging Kaufman to initiate a payroll squeeze. If the tape is to be believed, Kaufman's payroll squeeze began sometime before Cummis allegedly offered him "moral support" by saying "Yeah" on February 16!

Plaintiffs have not adduced any evidence that Park Place consulted with Kaufman before Kaufman initiated the payroll squeeze. They have adduced no evidence that Park Place induced President to begin the payroll squeeze or took any action in connection to bring it about. So they have not adduced any evidence that Park Place knowingly induced Kaufman to breach his fiduciary duty.

Plaintiffs argue that Park Place aided Kaufman's breach of fiduciary duty by promising Kaufman that Park Place would buy out President's interest in the non-performing Akwesane casino and grant it an interest in any Catskills casino Park Place might develop.

According to the evidence, Park Place made this offer on January 20, 2000. But there is no evidence that Park Place was aware on January 20 that Kaufman was engaged in, or anticipated engaging in, any payroll squeeze. Thus, the making of this offer could not possibly constitute "knowing participation" in Kaufman's alleged breach of fiduciary duty.[3]

So plaintiffs assert that, by not withdrawing this offer after Cummis allegedly learned of Kaufman's payroll squeeze on February 16, Park Place gave Kaufman "sufficient comfort to risk angering the Tribe" by breaching his fiduciary duty. With all respect to plaintiffs, this is a bootstrap that stretches the holding in *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843 (2d Cir.1987), beyond the bounds of reason.

In *S & K*, one Johnson was an employee of S & K. Like all employees, he had a fiduciary duty to his employer. Nike had a contractual relationship with S & K, which apparently it could terminate at will. *Id.* at 845. Johnson went to Nike behind his employer's back and offered to come work for Nike and play the

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3. Plaintiffs allege that what Park Place hoped to get in return was an introduction to the Tribe so it could try to negotiate a deal to develop a casino in the Catskills with the St. Regis Mohawk. (Plaintiffs' Supplemental Brief on the Issue of Wrongful Means, dated December 1, 2003, at 13.) They do not explain how making such an introduction would have violated any fiduciary duty that Kaufman owed to the Tribe by virtue of President-RC's Management Agreement for Akwesane. I cannot see that it would.

same role S & K was then playing pursuant to the Nike/S & K contract. Johnson induced Nike to terminate its relationship with S & K without disclosing that Nike was about to hire Johnson. The Second Circuit had little difficulty affirming a jury's conclusion that Nike had aided and abetted Johnson's breach of his duty to his employer by terminating its contract with S & K.

Here, however, there was no agreement between Park Place and the Tribe that Park Place abrogated so it could do a deal with Kaufman. Kaufman may have owed the Tribe a fiduciary duty analogous to the one Johnson owed S & K, but in January, February and March of 2000, Park Place's only duty was to its shareholders.[4] To say that Park Place was required to withdraw its offer to President-RC when it learned of Kaufman's breach of fiduciary duty is to create a duty between Park Place and the Tribe where the law imposes none. Of course plaintiffs do argue that they insist that a reasonable juror could conclude that Park Place engaged in "knowing participation" by exploiting the Tribe's economic position to procure the Catskill casino exclusive with knowledge of the payroll squeeze-but nothing in *S & K* or any other New York case suggests that a competitor who is not interfering with an

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4. In *Catskill IV*, I rejected Park Place's argument that a claim for tortious interference with fiduciary duty would lie only if President-RC had a fiduciary duty to plaintiffs (not to the Tribe, a third party). (See opinion dated October 7, 2003, at n. 5) Now that I examine plaintiffs' argument in its fulsomeness against the facts of *S & K*, I am inclined to think that conclusion was erroneous. I leave the issue for the Second Circuit.

enforceable contract cannot take advantage of the "customer's" known economic distress.

Moreover, plaintiffs have also adduced no evidence that Park Place received anything of value *as a result of the payroll squeeze.* Even if plaintiffs' strained reading of cases like *S & K,* 816 F.2d 843, and *Diduck v. Kaszycki & Sons Contractors, Inc.,* 774 F.Supp. 802 (S.D.N.Y.1991), *aff'd in part and rev'd in part,* 974 F.2d 270 (2d Cir.1992), were tenable, Park Place would have had to share in the benefits *from the breach of fiduciary duty* in order to "knowingly participate" in Kaufman's breach of fiduciary duty. *S & K,* 816 F.2d at 847-48 (emphasis added). Park Place's participation in the breach, as alleged by plaintiffs, lay in its making the $3 million loan in exchange for the exclusive development right-not in taking money from President that would otherwise have been used to meet the payroll at Akwesane! (Or, more accurately, taking advantage of the float created by the delay in meeting the payroll, since plaintiffs do not suggest that the employees were not eventually paid).

In any event, Park Place's allegedly wrongful act happened because the Tribe needed a lot of money to pay the State of New York-not to meet payroll at the casino. The Tribe had fallen behind in payments to the State because the casino was in dire financial straits. And the evidence demonstrates, without dispute, that the Akwesane casino was in dire financial straits because it was a poor performer and had been for years! There is simply no evidence that the alleged payroll squeeze

caused the financial problem that led the Tribe to default in making payments to the State.

The only alleged breach of fiduciary duty here is Kaufman's slowing down of the payroll. Although I vacated the original judgment and gave them every opportunity to uncover *evidence* that would link the payroll situation at Akwesane to the Tribe's need for a source of funds to make a $3 million payment to the State of New York, plaintiffs have not identified any evidence tending to show that the payroll squeeze occasioned the non-payment of the $3 million, which in turn occasioned the State's demand for payment, which in turn occasioned the Tribe's immediate need for a loan. Plaintiffs really want this court to hold that, because Kaufman told Cummis that he was squeezing the Tribe's payroll, Park Place was somehow barred from accepting the Tribe's offer of an exclusive in exchange for $3 million. That is not the law.

Plaintiffs have had ample opportunity to try to weave all these strands into a coherent story that would tar Park Place with some knowing participation (whether by orchestrating or receiving the benefits from) Kaufman's alleged payroll squeeze. They have generated a lot of smoke. They have not succeeded in raising a genuine issue of material fact on the issue of either "wrongful means" or "knowing participation in a breach of fiduciary duty." I leave intact my rulings on those issues as set forth in *Catskill III*.

III. "Wrongful Means:" The Impact of *Scutti*

The only other point that needs to be addressed before this case returns to the Second Circuit is plaintiffs' argument that the Second Circuit's decision in *Scutti Enterprises, LLC v. Park Place Entertainment Corp.*, 322 F.3d 211 (2d Cir.2003)—a case decided after *Catskill III*—indicates that this court should have reached a different result in *Catskill III*. It does not.

In *Scutti*, the Second Circuit reversed Chief Judge Telesca's grant of a motion to dismiss for failure to state a claim of tortious interference with prospective business relationship (Fed.R.Civ.P. 12(b)(6)) and remanded the case so that discovery could be conducted into whether a limitation (the VTL limitation) in a contract between Park Place and the Mohawks concerning the Akwesane casino "had a legitimate business purpose or was related to any viable business interest that Park Place had in the Akwesane casino." *Scutti, supra*, 322 F.3d at 217. The Second Circuit acknowledged that it "appears" that the VTL limitation had a legitimate business rationale, but said, "It is not beyond doubt that Scutti could demonstrate that Park Place's loan offer, which induced the Mohawk's [sic] agreement to the limitation, was economic pressure unrelated to that business." *Id.* The panel made it clear that it was not expressing any opinion as to the validity of Scutti's arguments, and indicated that a summary judgment motion or trial, rather than a pre-answer motion to dismiss, would be the proper vehicle for resolving that question. *Id.*

Unlike Chief Judge Telesca in *Scutti,* this court in *Catskill III* was not deciding a pre-answer motion to dismiss, but a summary judgment motion on a developed record. The record has been further developed in connection with my recall of the case in response to plaintiffs' Fed.R.Civ.P. 60(b) motion. Plaintiffs' problem is that the fully developed record does not bear out their claims. About this, *Scutti* says nothing.

CONCLUSION

The Court having recalled this case from the United States Court of Appeals for the Second Circuit, and the parties having had an opportunity for discovery and briefing concerning the issue of "wrongful means," I adhere to my previous conclusion that defendants have not raised any genuine issue of material fact on the question of "wrongful means"—or, for that matter, on the question of the commission of any independent tort by Park Place. Therefore, I adhere to my decision granting summary judgment to defendants and dismissing the complaint in its entirety.[5]

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5. Two more years having passed, and no casino having arisen in the Catskills-although I have read in the press that plaintiffs or their successors in interest appear to be making more headway toward that goal in partnership with a different tribe than Park Place is making with the St. Regis Mohawk—I am more convinced than ever that Park Place was entitled to summary judgment on the ground that plaintiffs' proposed venture with the Tribe was too speculative to support an award of damages (the so-called "but for causation" argument).

I direct the Clerk of the Court to enter an appropriate order and the parties to restore this case to the calendar in the United States Court of Appeals for the Second Circuit immediately.